(23)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक .....सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

CRIMINAL APPEAL No.346 of 2005

APPELLANT Prakash Yadav, S/o. Manju, age about 24 years R/o Kulahari Goat, Distt.-Dhamtari(C.G.)
In Jail

Vs

RESPONDENT State of Chhattisgarh

Present:
Mr. Arun Kochar, Adv. with Mr. Hemant Solapurkar, Adv. for the appellant.
Mr. Neeraj K Mehta, Panel Lawyer for the respondent-State.

ORAL JUDGMENT

(23rd November, 2007)

Per Dhirendra Mishra, J:

This criminal appeal is directed against the judgment of conviction and order of sentence dated 26.2.2005 passed in S.T. No.5/04 whereby learned Special Judge under Scheduled Caste & Scheduled Tribe (Prevention of Atrocities) Act, 1989 (for short 'Act'), Raipur has convicted the appellant under Section 376 (1) of Indian Penal Code (for short 'IPC') and sentenced with R.I. for 8 years and to pay a fine of Rs.5,000/-, in default of payment of fine to undergo additional R.I. for 10 months.

Case of the prosecution, in brief, is that on 13.12.2003 at about 2.00 p.m. Janeshram (PW-4) & Dhiraji (PW-5) came to the house of Santram for tying bullocks and when they entered the house of Santram after pushing the door, they saw that the appellant was committing sexual intercourse with the deaf & dumb prosecutrix, aged about 18 years in animal barn of Santram. The incident was narrated by them to Gadaram,

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -2-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

Bedanbai & Gomtibai. However, the accused ran away after freeing himself, as the Dhiraji had caught him. The matter could not be reported to the police immediately after the incident, as the night has set-in and ultimately the report was lodged on 14.2.2003 by Janesh (PW-4) vide written report of Ex.P-3 in the Police Station Magarlod and on the basis of above written report, offence under Section 376 (1) of the IPC and Section 3 (1) (12) of the Act was registered vide FIR of Ex.P-4.

During investigation the prosecutrix was sent for medical examination to the Community Health Centre, Magarlod where Dr. (Smt.) Sharda Thakur (PW-7) examined her and gave her medico legal examination report of Ex.P-6. Vaginal slides and underwear of the accused seized during investigation were sent for chemical examination to Forensic Science Laboratory and according to the report of FSL of Ex.P-12 human sperms were found over the slides.

After completing investigation, the charge sheet was filed against the appellant for the offence punishable under Section 376 (1) of the IPC & Section 3 (1) (12) of the Act. During trial, the prosecution examined 18 witnesses in all and thereafter statement of the accused was recorded under Section 313 of the Cr.P.C. in which the appellant denied the evidence appearing against him in the prosecution case and took a defence that he had a quarrel with complainant Janesh (PW-4) some seven months before the incident and because of the above animosity he has falsely

(25)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

implicated him. However, learned Special Judge after hearing learned counsel for the respective parties, acquitted the appellant from the charge under Section 3 (1) (12) of the Act, however, convicted him under Section 376 (1) of the IPC and sentenced him as mentioned in Para-1 of this judgment.

Learned counsel for the appellant argued that the prosecutrix has not been examined in this case during trial though Section 119 of the Evidence Act provides for examination of the deaf and dumb witness also and thus, valuable right of the appellant of cross-examining the prosecutrix has been prejudiced. He further argued that the conviction is based on the statement of Janesh (PW-4) & Dhiraji (PW-5), who claimed themselves to be the eyewitness, however, from perusal of their statements it would be evident that they have stated when they reached the appellant was standing, whereas, prosecutrix was lying on the ground and they have not actually seen the act of intercourse.

On the other hand, learned counsel for the State supported the impugned judgment.

I have heard learned counsel for the parties. I have perused the impugned judgment as also the evidence available on record.

The prosecutrix was produced and examined as PW-3 and from perusal of the observations recorded by the special court it is evident that a trained teacher of Government Deaf & Dumb School, Shri H.P.

XI-HC—78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(26)

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

Rajput was present for recording statement of the prosecutrix, he was also administered oath for that purpose and questions were put to the prosecutrix through him. However, since the prosecutrix was mentally retarded also in addition to being deaf & dumb she was not able to understand the signs and she was staring blankly. Her parents also confirmed that she does not respond to signs and therefore, her statement could not be recorded as she was not a competent witness and the same appears to be justified.

Conviction is also based on the statement of Janesh (PW-4) and Dhiraji (PW-5) as also statement of Dr. (Smt.) Sharda Thakur (PW-7) who had examined the prosecutrix after the incident.

Janesh (PW-4) has stated that when he entered the animal barn of Santram after pushing the door, he saw the accused committing sexual intercourse with the prosecutrix and after seeing him he left her and ran towards inside. He took out the prosecutrix from there. At that time witness Dhiraji (PW-5) was also with him and he also saw the appellant having sex with the prosecutrix. Having asked Dhiraji to remain there, he went to call the persons and thereafter he lodged the report of Ex.P-3. In his cross-examination he has denied the suggestion that he had a quarrel with the accused some 2-3 months back. He has further denied that he is falsely implicating the appellant because of animosity and he stuck to his claim that he saw the appellant committing sexual intercourse

XI-HC—78

(27)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -5-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

with the prosecutrix. He has also stated that the prosecutrix is a deaf, dumb and mentally retarded girl.

Similar is the statement of Dhiraji (PW-5) though he has stated that when he entered the room he saw that the prosecutrix was lying on the ground, whereas, the accused was standing.

Dr. (Smt.) Sharda Thakur (PW-7), who examined the prosecutrix on 14.12.2003, has observed that hymen of the prosecutrix was ruptured, however, there was no injury except over the aneria region of thighs and she has categorically opined that possibility of rape was there.

Looking to the disability of the prosecutrix and particularly considering that the prosecutrix was a mentally retarded, deaf and dumb girl, who was not even able to understand the gestures and signs, the question of the prosecutrix being consenting party is ruled out. It has already been held that she was an incompetent witness because of her physical disablement and the involvement of the appellant in sexual exploitation of the prosecutrix, who is a deaf, dumb & mentally retarded girl, is fully established from the statements of Janesh (PW-4) & Dhiraji (PW-5) and the defence could not be able to make their testimony untrustworthy or unreliable by way of cross-examination.

In the result, there is no merit in the appeal, the same is liable for dismissal and it is accordingly dismissed.

Sd/-
Dhirendra Mishra
Judge

R